

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

**ENTERED**

TAWANA C. MARSHALL, CLERK  
THE DATE OF ENTRY IS  
ON THE COURT'S DOCKET

IN RE:

e2 COMMUNICATIONS, INC.

Debtor.

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Case No. 02-30574-BJH-11

**MEMORANDUM OPINION**

Came before the Court for consideration, Monarch Capital Partners, LLC, Chris S. Carter, J. Wade Browne, Ian J. Bonner and Email Partners, LLC's "Motion for Allowance of Fees and Expenses as an Administrative Claim" ("the Motion"), filed on November 20, 2002. The Court has jurisdiction over the Motion pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(a). Furthermore, the Court has the authority to enter a final order on the Motion as it constitutes a core proceeding as contemplated by 28 U.S.C. § 157(b)(2)(A), (B) & (O). After consideration of the Motion, Trustee Robert Carringer's "Limited Objection to the Motion," filed on December 10, 2002, the United States Trustee's "Comment to the Motion," filed on December 20, 2002, and the parties' arguments at a hearing held on March 19, 2003, the Court, pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014, submits this memorandum opinion as its findings of fact and conclusions of law.

**FACTUAL BACKGROUND**

On January 25, 2002, an involuntary petition for relief under Chapter 11 of the Bankruptcy Code (the "Code") was filed against e2 Communications, Inc. (the "Debtor") pursuant to 11 U.S.C. § 303(b). The Debtor, a privately held corporation, was engaged in providing permission based e-mail marketing and communications solutions through its hosted e-mail based software and services. Thereafter, on February 14, 2002, the Debtor consented to the entry of a voluntary petition for relief under Chapter 11 of the Code. Subsequently, on March 1, 2002, the Court ordered the appointment of a Chapter 11 Trustee pursuant to 11 U.S.C. § 1104(a)(2) to oversee the Debtor, afterwhich the United States Trustee (the "US Trustee") appointed Robert Carringer as the Chapter 11 Trustee (the "Trustee").

After the Trustee was appointed, he sought to obtain financing for the Debtor pursuant to 11 U.S.C. § 364(c), which ultimately resulted in the Debtor receiving \$500,000 in DIP financing

(the “DIP Financing Agreement”) from Email Partners, LLC (“Email Partners”). After entering into the DIP Financing Agreement, the Trustee sought to sell the Debtor’s assets pursuant to 11 U.S.C. § 363. Ultimately, the Court approved the Trustee’s Motion to Sell and the Trustee sold substantially all of the Debtor’s assets to Bluestreak.com, Inc. (“Bluestreak”). During the bidding process for the Debtor’s assets, two plans of reorganization were submitted to the Court, one from the Trustee, and the other from a group comprised of Email Partners, Monarch Capital Partners, LLC, Chris S. Carter, J. Wade Browne, and Ian J. Bonner (collectively the “Applicants”). After both the Trustee and the Applicants objected to each other’s plans, in addition to objections filed by other parties in interest, both the Trustee and the Applicants (collectively the “Plan Proponents”) agreed to submit a joint plan of reorganization.

In advance of the Plan Proponents submitting their joint plan of reorganization, Jeffrey L. Farris (“Farris”), a founder of the Debtor and former Director, CEO and President, filed his Motion to Convert to Chapter 7 (the “Motion to Convert”). Both the Plan Proponents and Steve Flory (“Flory”), a former shareholder of the Debtor and the sole dissenting shareholder to the Debtor’s failed merger with eSynergies, Inc. (“eSynergies”), filed objections to the Motion to Convert, with the Court ultimately denying the Motion to Convert without prejudice. During the opposition to conversion, the Plan Proponents filed the first of four joint disclosure statements and joint plans of reorganization. The Court denied approval of the Plan Proponents “Joint Disclosure Statement for e2 Communications, Inc.” (the “Joint Disclosure Statement”), but after the amendment of the joint disclosure statement three times, the Court finally approved the “Third Amended Joint Disclosure Statement for e2 Communications, Inc.” (the “Third Joint Disclosure Statement”) on October 9, 2002. Prior to the Court’s confirmation of the Plan Proponents “Third Amended Joint Plan of Reorganization for e2 Communications, Inc.” (the “Third Joint Plan”) on February 10, 2003, the Applicants filed their motion for allowance of an administrative claim that is the subject of this memorandum opinion.

#### **DISCUSSION AND ANALYSIS**

Pursuant to their Motion, the Applicants seek allowance and payment from the estate for the professional services and expenses incurred by Hance Scarborough Wright Ginsberg & Brusilow, LLP (“HSWGB”) in representing the Applicants. Over the time period from February 21, 2002 through September 19, 2002, HSWGB spent 385.25 hours rendering professional services for the Applicants, incurring fees in the amount of \$115,842.00 and expenses in the

amount of \$4,782.19. Despite the actual fees and expenses incurred, the Applicants have reduced those amounts and only seek to recover \$100,000.00, as that was the amount estimated by the Applicants in the Third Joint Disclosure Statement. The \$100,000.00 being sought is in addition to the \$50,000.00 set aside in Section 6.3 of the confirmed Third Joint Plan to pay the Applicants for their fees and expenses in connection with the case. The Applicants allege that these professional services and expenses were incurred in the making of a “substantial contribution” to the Debtor and are thus recoverable as an administrative expense.

Administrative expenses are governed by 11 U.S.C. § 503, which provides in pertinent part:

(a) An entity may *timely file* a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

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(3) the *actual, necessary expenses*, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—

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(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a *substantial contribution* in a case under chapter 9 or 11 of this title;

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(4) *reasonable compensation* for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

11 U.S.C. §§ 503(a), (b)(3)(D) & (b)(4) (West 1994) (emphasis added). Therefore, for the Applicants to be entitled to an administrative expense, they must show by a preponderance of the evidence<sup>1</sup> that: (1) they filed a timely motion for an administrative claim under § 503(a); (2) the services provided made a substantial contribution to the Debtor’s estate under § 503(b)(3)(D); (3) the expenses were actual and necessary under § 503(b)(3); and (4) the compensation for professional services is reasonable under § 503(b)(4).

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<sup>1</sup> See *In re Buttes Gas & Oil Co.*, 112 B.R. 191, 193 (Bankr.S.D.Tex. 1989) (“The burden of proof is on the movant or applicant in establishing their entitlement to an award under 11 U.S.C. § 503(b) and they must demonstrate by a preponderance of the evidence that a substantial contribution was made.”)

## **1. Timeliness of Administrative Expenses Under 11 U.S.C. § 503(a)**

A request for an administrative expense must be timely filed under § 503(a). Though the Bankruptcy Code requires administrative expense claims be timely, neither the Code nor the Bankruptcy Rules set forth a specific deadline. To be considered timely filed, a motion for an administrative expense must only be filed prior to the deadline set by the bankruptcy court. *See Hall Financial Group, Inc. v. DP Partners Ltd. Partnership (Matter of DP Partners Ltd. Partnership)*, 106 F.3d 667, 671-72 (5th Cir. 1997); *see also* 3 *Collier on Bankruptcy* ¶ 503.1, at 503-4 n.2c (Lawrence P. King ed., 15th ed. 1994) (the Bankruptcy Reform Act of 1994 sets no time limit for filing administrative claims, and as such, bankruptcy judges “may set such deadlines on a case by case basis”). Pursuant to the February 10, 2003 “Order Confirming Third Amended Joint Plan of Reorganization for e2 Communications, Inc.,” any person or entity holding an administrative claim, other than a fee claim, was required to file such claim within sixty (60) days after the Effective Date of the Plan. Here, the Effective Date of the Plan was April 11, 2003, which would require an administrative expense claim be filed prior to June 10, 2003. Therefore, the Court considers the Motion, which was filed on November 20, 2002, to be timely filed.<sup>2</sup>

## **2. Substantial Contributions Under 11 U.S.C. § 503(b)(3)(D)**

A § 503(b)(3)(D) administrative claim award is mandatory and requires a creditor recover his fees and expenses if those fees and expenses were incurred in making a substantial contribution to a Chapter 11 case. Generally, “a creditor’s attorney must ordinarily look to its own client for payment, unless the creditor’s attorney rendered services on behalf of the reorganization, not merely on behalf of his client’s interest, *and conferred a significant and demonstrable benefit* to the debtor’s estate and the creditors.” *Pierson & Gaylen v. Creel & Atwood (Matter of Consolidated Bancshares, Inc.)*, 785 F.2d 1249, 1253 (5th Cir. 1986). Though the Fifth Circuit Court of Appeals has stated that whether a creditor conferred a significant and demonstrable benefit is “best left on a case-by-case basis,” *DP Partners*, 106 F.3d at 673, the Circuit has stated that services that confer significant and demonstrable benefits are those that “foster and enhance, rather than retard or interrupt the progress of reorganization,”

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<sup>2</sup> In addition, as a Plan Proponent, the Applicants were required by 11 U.S.C. §§ 1125(b) and 1129(a)(4) to disclose their intent to recover fees and expenses by proposing a plan, with those disclosures requiring listing in both the plan and the disclosure statement. The Applicants complied with both these statutes.

*Consolidated Bancshares*, 785 F.2d at 1253, and that are “considerable in amount, value or worth.” *DP Partners*, 106 F.3d at 673.

Furthermore, as part of the valuation calculus, courts should also consider “whether the services were duplicative of services rendered by attorneys for the committee, the committees themselves, or the debtor and its attorneys.” *Buttes Gas & Oil*, 112 B.R. at 194. However, services “are not [to be] diminished by selfish or shrewd motivations[, as]...a creditor’s motive in taking actions that benefit the estate has little relevance in the determination whether the creditor has incurred actual and necessary expenses in making a substantial contribution to a case.” *DP Partners*, 106 F.3d at 673. Ultimately, courts “should weigh the cost of the claimed fees and expenses against the benefits conferred upon the estate which flow *directly* from those actions,” with any “[b]enefits flowing to only a portion of the estate or to limited classes of creditors [being proportionately]...diminished in weight,” *Id* (emphasis added), while compensation should be “denied where the services rendered by the creditor or shareholder were only remotely related to the reorganization.” *Consolidated Bancshares*, 785 F.2d at 1253 (internal quotations removed).

Though “the policy aim of authorizing fee awards to creditors [for substantial contributions] is to promote meaningful creditor participation in the reorganization process,” *DP Partners*, 106 F.3d 667 at 673, courts must still be mindful that every dollar that is awarded as an administrative claim is a dollar that is not available for creditors. *See Buttes Gas & Oil*, 112 B.R. at 196 (the “stimulation and encouragement of meaningful creditor participation in reorganization proceedings...must be balanced by the requirement of keeping administrative expenses to a minimum”); *In re Canton Jubilee, Inc.*, 253 B.R. 770, 775 (Bankr.E.D.Tex. 2000) (§ 503(b) is “narrowly construed in order to hold administrative expenses to a minimum amount and thus preserve the estate assets for the benefit of all creditors.”). In order to ensure that an estate does not incur needless administrative claims, courts should scrutinize those claims, irrespective of support given by other parties, so as to ensure that the claimed fees and expenses are compensable and to eliminate any “conspiracy of silence” or “backscratching” between the professionals. *See Consolidated Bancshares*, 785 F.2d at 1255. To this end, § 503(b)(3)(D) “should not be used as a method for reimbursement of every creditor who elects to hire an attorney...[, as t]he integrity of § 503 can only be maintained by limiting compensation to

unusual creditor actions which lead to [significant and] demonstrated benefits to the creditors, debtor or the estate.” *Buttes Gas & Oil*, 112 B.R. at 196.

In support of their § 503(b)(3)(D) substantial contribution claim, the Applicants advance two bases: (A) the Applicants preserved and increased the value received by the estate from the sale of the Debtor’s assets; and (B) the Applicants protected the estate’s value for the benefit of all creditors through avoiding conversion and seeking confirmation. Pursuant to *DP Partners*, the Court will “make specific and detailed findings”<sup>3</sup> analyzing each of these bases and the actions taken by the Applicants supporting their administrative claim request.

**A. Preservation and Increase in the Value of the Debtor’s Assets**

*(1) The DIP Financing Agreement*

Pursuant to their Motion, the Applicants argue that they made a substantial contribution by preserving the value of the Debtor’s assets. In support of that argument, the Applicants state that they preserved the value of the Debtor’s assets by providing the Debtor with \$500,000 through the DIP Financing Agreement, which allowed the Trustee to pay operational expenses, keep the business together as a going concern, and give the Trustee time to explore options for the sale of the Debtor’s assets. Though the record before the Court shows that the DIP Financing Agreement did allow the Trustee to pay operational expenses and keep the business together while he explored options for the Debtor’s future, the financing merely maintained the Debtor’s value as a going concern but did not necessarily “foster and enhance” its value. *Consolidated Bancshares*, 785 F.2d at 1253; *see also In re Communications Management & Information, Inc.*, 172 B.R. 136, 142 (Bankr.N.D.Ga. 1994) (providing financing to the debtor only maintained going concern value but did not significantly enhance the value). Moreover, because the DIP Financing Agreement did not provide benefits to the Debtor that were “considerable in amount, value or worth,” *DP Partners*, 106 F.3d at 673, the Court finds that the Applicants did not make a substantial contribution when Email Partners entered into the DIP Financing Agreement with the Debtor.

Furthermore, the Court finds that professional fees and expenses incurred in drafting a DIP financing order are to be governed by § 364 rather than § 503(b)(3)(D). Section 364 specifically pertains to obtaining credit or incurring debt, within which an agreement to pay professional fees and expenses should be included, while § 503(b)(3)(D) generally allows for the

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<sup>3</sup> 106 F.3d at 673.

recovery of professional fees from actions making a substantial contribution. As “it is well established that a more specific statute controls over a more general one,” *United States v. Prescription Home Healthcare, Inc. (In re Prescription Home Healthcare, Inc.)*, 316 F.3d 542, 548 (5th Cir. 2002), the Applicants must look to the terms of the DIP Financing Agreement for their compensation and should not be granted a § 503(b)(3)(D) administrative claim when they fail to negotiate adequate compensation for themselves.<sup>4</sup>

Per the terms of the DIP Financing Agreement, Email Partners received 5% interest, the option to convert the loan into new equity in the Debtor, and were guaranteed repayment of the loan due to their superpriority status. The Court believes that these terms, which were bargained for at arms length, adequately compensate the Applicants. *See Communications Management*, 172 B.R. at 142-43 (time expended negotiating post-petition financing entitles no compensation or expense reimbursement as interest charged on loan adequately compensated party) and *In re Traverse City Limited Partnership*, 108 B.R. 648, 650 (Bankr.N.D.Ill. 1989) (general partner not entitled to have its legal fees incurred in lending money to the debtor paid by the estate, as the general partner must look to the consideration it bargained for). Had Email Partners and the Applicants wished to recover the attorneys’ fees and expenses expended in the negotiating and drafting the DIP Financing documents, they could have included such terms in the documents.<sup>5</sup> Moreover, because almost every successful Chapter 11 requires DIP financing, it goes without

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<sup>4</sup> The Court not only believes that § 364 is the proper avenue to recover professional fees and expenses incurred in providing DIP financing, but it is also the more efficient method. By requiring that the DIP financier include any payment of professional fees and expenses in the § 364 order, this allows the Court to approve such expenses and fees when it considers the § 364 motion to obtain credit, which is more contemporaneous with the incurrence of the fees and expenses, as opposed to having to look back and scrutinize the fees and expenses after they have been incurred as § 503(b)(3)(D) requires. *See generally, In re Consolidated Bancshares, Inc.*, 49 B.R. 467, 475 (Bankr.N.D.Tex. 1985) (“Applicants for allowance of administrative expenses under section 503(b)(3)(D) and (4) must be carefully scrutinized. Such applications are filed after the fact, that is, after the services have been performed or the expenses have been incurred, and without prior approval, and in many instances, without the court’s knowledge.”).

<sup>5</sup> J. Wade Browne (“Browne”) testified at the March 19, 2003 hearing that the Applicants made the DIP Financing Agreement on the terms that it did, including the 5% interest rate, so as to not impede the Debtor’s reorganization by strapping it with a high-interest rate loan. However, at the time the DIP Financing Agreement was entered into, the Applicants still hoped that they could still gain control of the Debtor, evidenced by the inclusion in the DIP Financing Agreement of the provision that allowed for the loan to be converted into equity, in addition to the Applicants’ plan, which provided for a credit bid of the DIP Financing Agreement with the Applicants operating the Debtor going forward. As such, the Court believes the Applicants did not want the Debtor to have a high interest rate loan because they did not want to carry a high interest loan after they took control of the Debtor. Thus, while Browne would like this Court to believe that the Applicants’ motives in negotiating the terms of the DIP Financing Agreement were completely altruistic in an attempt to have this Court disregard the terms of the DIP Financing Agreement and allow the Applicants an administrative claim for what they failed to negotiate, the Court will leave the Applicants in the position they bargained for.

saying that such financing provides some benefit to the estate by keeping it alive. *See Traverse City*, 108 B.R. at 650 (“Presumably every business transaction entered into by a debtor-in-possession is for the benefit of the estate.”). However, finding that the fees and expenses incurred in providing that financing rise to the level required for an administrative expense under § 503(b)(3)(D) would set a terrible precedent for the ever-increasing attempts of parties to recover substantial contribution claims.<sup>6</sup> Ultimately, parties are entitled to be compensated for their fees and expenses in providing DIP financing, but they must recover those fees and expenses by negotiating for them in the § 364 financing agreement and not through a § 503(b)(3)(D) administrative claim.

*(2) The Motion to Sell, the Applicants’ Plan and the Trustee’s Plan*

The Applicants also argue in their Motion that they made a substantial contribution by increasing the value received by the estate from the sale of the Debtor’s assets. To buttress that argument, the Applicants state that by opposing Bluestreak’s offers of \$750,000 and \$450,000 and threatening to propose a substantially higher offer, and their objecting to the Trustee’s Motion to Sell and by filing the Applicant’s plan, which proposed infusing \$1.5 million in cash with the continuation of the Debtor’s business, the Applicants increased the value received by the estate from the sale of the Debtor’s assets by driving up Bluestreak’s offer to include a cash payment of \$2,000,000 and a guaranteed royalty of \$600,000. Ultimately, the Applicant’s state that the effect of these actions benefited creditors by at least \$1.85 million, which is composed of Bluestreak’s increased offer to \$2 million, resulting in at least a \$1.25 million benefit, plus the additional \$600,000 minimum in royalty payments which had not been part of Bluestreak’s previous offer.

Initially, the Court must note that the Trustee’s Motion to Sell received only one objection, the objection filed by the Applicants. It appears this objection was filed because the Applicants’ offer to buy the assets of the Debtor was rejected by the Trustee as the lowest offer received. Moreover, the issues raised in the objection were facts that had changed since the Motion to Sell had been filed and were required to be disclosed by the Trustee irrespective of the objection, or were meritless (as in the allegation that the Motion to Sell was a sub rosa plan).

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<sup>6</sup> *See generally*, Cynthia A. Baker, *Other People’s Money: The Problem of Professional Fees in Bankruptcy*, 38 ARIZ. L. REV. 35 (1996) (discussing changes to system for compensating professionals, with an effective system “correct[ing] the misallocation that permits one group to spend, while another group pays.”).

Since the objection provided no real substance, it served more to “retard or interrupt the progress of reorganization.” *Consolidated Bancshares*, 785 F.2d at 1253. Therefore, because the Applicants’ objection to the Motion to Sell did not provide benefits to the Debtor that were “considerable in amount, value or worth,” *DP Partners*, 106 F.3d at 673, the Court finds that the Applicants did not make a substantial contribution by objecting to the Motion to Sell.

Additionally, the Applicants seek to cause the Court to believe that they were the driving force behind Bluestreak raising its bid to buy the assets of the Debtor. However, the mere participation by the Applicants in the bidding process does not allow them to recover their fees for participating. They must show that their participation provided benefits that were “considerable in amount, value or worth.” *DP Partners*, 106 F.3d at 673. Here, the facts show that the Applicants’ offer was the lowest offer received. That the Applicants rationalize that this offer drove Bluestreak to up its offer to \$2 million is not in accord with the record. In fact, when the Trustee filed his Motion to Sell, Bluestreak’s offer had already been increased to \$2 million. Thus, the participation by the Applicants in the bidding process did not increase Bluestreak’s offer as the Applicants argue. Therefore, because the actions of the Applicants in participating in the bidding for the Debtor’s assets did not provide benefits to the Debtor that were “considerable in amount, value or worth,” *DP Partners*, 106 F.3d at 673, the Court finds that the Applicants did not make a substantial contribution by participating in the bidding for the Debtor’s assets.

Finally, the Applicants argue that their proposal of a plan of reorganization and their opposition to the Trustee’s plan of reorganization made a substantial contribution to the estate. The Applicants’ plan was proposed as an option versus the Motion to Sell. However, the proposal of the Applicant’s plan was not made to better the estate, but was made so that the Applicants would have another shot at gaining control of the Debtor even after they lost in the bidding process. This is evident from the terms of the plan, wherein the Applicants’ proposed the following: a credit bid of the DIP Financing with the continuation of the Debtor’s operations under the Applicants control; the assignment of the Debtor’s litigation to the Applicants for their benefit and control; and if the Applicants were to recover any sums from this litigation, the Debtor would only receive 25% of the recoveries after the costs of litigation were deducted.

The Applicants’ plan received objections from the Trustee, the US Trustee and a group of employees of the Debtor. These objections raised numerous issues with the disclosure statement and plan, including the failure to disclose the following: the make-up of Email Partners and its

future members and the relationships between those persons/entities and the Debtor; that the Applicants may face potential liability for their vote in favor of the failed acquisition by eSynergies; that the Plan may not be confirmable because it allows for the payment of administrative claims, representing liabilities incurred in the ordinary course of business; how the creditors will receive more in a plan than they will in a liquidation; what the proposed compensation will be for the proposed post-confirmation insiders operating the ongoing business concerns of the Debtor; and how the Debtor will reach the profits projected for future years despite its failures to do so under the current business model; and also how the Debtor plans to survive through confirmation with the fact that any new debt will change the Debtor's debt structure rendering the proposed plan potentially obsolete. Moreover, the plan was un-confirmable on its face because it was in violation of 11 U.S.C. § 1129(b)(2)(B), the absolute priority rule.

Ultimately, the filing of the Applicants' plan delayed the sale process for three weeks and caused the Trustee to file his own competing plan as a backup to the Motion to Sell. Since the Applicants' plan was un-confirmable and merely filed as another attempt to obtain the assets of the Debtor after having lost in the bidding process, the Court finds that the filing of the plan served more to "retard or interrupt the progress of reorganization." *Consolidated Bancshares*, 785 F.2d at 1253. Therefore, because the Applicants' plan did not provide benefits to the Debtor that were "considerable in amount, value or worth," *DP Partners*, 106 F.3d at 673, the Court finds that the Applicants did not make a substantial contribution by filing their plan of reorganization.

## **B. Protecting the Estate's Value For the Benefit of All Creditors**

### *(1) The Motion to Convert*

The Applicants further argue in their Motion that they made a substantial contribution by protecting the estate's value for the benefit of all creditors through avoiding conversion. In support of this argument, the Applicants state that the estate's value was protected for the benefit of all creditors through their participation in challenging Farris' Motion to Convert, including assisting in discovery to contest conversion, which resulted in the Motion to Convert being deemed moot.

Pursuant to the Motion to Convert, Farris sought to convert the Debtor to Chapter 7 based on his concern for the Debtor's potential causes of action and how they would be addressed in a

plan of reorganization. Primarily, Farris objected to the lack of analysis and valuation of the Debtor's causes of action, including the potential of bringing a meritless suit against himself, and the fact that creditors would receive only a 25% contingency in any net proceeds of any causes of action after the Applicants and their counsel are paid 100% of their costs incurred in bringing those claims. In addition, Farris argued that the Debtor's creditors would have no say in which claims are brought and what counsel will bring the claims, as the Applicants, insiders and old equity holders, would control those causes of action which they obtained in a non-competitive manner. Furthermore, he posited that the Applicants proposed plan of reorganization was merely an attempt to shield them from potential liability by controlling the Debtor's causes of action. Farris proposed that the Debtor be converted to a Chapter 7, where the causes of action, the only valuable assets of the Debtor that remained after the sale, could be sold by a trustee for an immediately realizable cash value, maximizing the value for creditors by exposing the Debtor's causes of action to the open market. To that end, Farris offered to buy the Debtor's causes of action, other than avoidance and preference actions, for \$100,000 and relinquishment of his \$857,982.04 claim against the Debtor, which Farris valued as being worth \$200,000 in tangible, present value to the estate.<sup>7</sup>

However, it was not merely the Applicants who objected to the Motion to Convert, as the Trustee and Flory also filed a responses to the Motion to Convert. As was the case with the Applicants' plan, where the Applicants sought to take control of the Debtor's assets, the Motion to Convert was an attempt by Farris to take control of the Debtor's assets, which at this stage of the case only consisted of the Debtor's causes of action. The fact that there were potential causes of action against former officers and directors of the Debtor came up early on in the case, as the parties argued over who would be able to bring these causes of action. Of course, potential targets would want to control these causes of actions so as to eliminate any possible lawsuits against themselves. This is in fact what the Motion to Convert sought to affect, by allowing Farris to buy the Debtor's causes of action for a price less than what has potential liability would

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<sup>7</sup> By way of comparison, Farris argued that under the terms of the Applicants' plan, if the Debtor's causes of action recovered \$1,000,000, after the Applicants paid their attorneys' fees and take their 75% interest in those recoveries, the estate would only net \$175,000. In addition, the \$175,000 would only be paid to creditors upon the conclusion of the litigation, and thus, when the time value of money is factored in, the proposed \$175,000 recovery would be less after reduced to present value.

be. However, despite the objections by the Applicants, the Trustee and Flory,<sup>8</sup> the Court did not allow the Debtor's causes of action to be sold to a potential target, and accordingly denied the Motion to Convert. Therefore, because the Applicants' objection to the Motion to Convert did not provide benefits to the Debtor that were "considerable in amount, value or worth," *DP Partners*, 106 F.3d at 673, the Court finds that the Applicants did not make a substantial contribution by objecting to the Motion to Convert.

(2) *The Joint Plans of Reorganization*

Finally, the Applicant's argue in their Motion that they protected the estate's value for the benefit of all creditors through attempting confirmation. In support, the Applicants state that their participation as a Plan Proponent resulted in the approval of a joint disclosure statement and confirmation of a joint plan of reorganization, which including three amendments, extensive work reviewing and resolving all objections, and the inclusion of a trust to investigate and pursue causes of action for the benefit of the estate.

After having unsuccessfully confirmed either the Trustee's or the Applicants' plans, and in an effort to resolve the Applicant's objection to the Motion to Sell, both parties agreed to submit a joint plan of reorganization. On June 27, 2002, the Plan Proponents filed their Joint Disclosure Statement and "Joint Plan of Reorganization for e2 Communications, Inc." (the "Joint Plan"). The substance of the Joint Plan was the creation of two trusts: a Creditor's Trust, which would receive the available monies from the Bluestreak sale and the available avoidance and preference causes of action; and a Litigation Trust, which would receive all other causes of action owned by the estate. However, the Joint Plan drew objections from both the US Trustee and Farris. The objections raised the following viable issues: who the investors in the proposed Litigation Trust would be; failure to disclose that the Litigation Trust Board would be comprised of former officers and directors of the Debtor, potentially immunizing them from suit by giving them control of the Debtor's causes of action; the lack of identity of the law firm that would handle the Debtor's causes of action and that firm's relationship with the Applicants; and why the Applicants would receive the bulk of any recovery from the causes of action, including why the estate is not prosecuting the cause of action on its own behalf. But the fatal flaws of the Joint

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<sup>8</sup> It should be noted that the substance of both the Applicants and Flory's responses to the Motion to Convert was substantially the same as the response filed by the Trustee, wherein he stated that conversion would only benefit Farris' interests and not the interests of creditors as a whole. Thus, the Court finds the Applicants objection to be duplicative of services rendered by the Trustee. *Buttes Gas & Oil*, 112 B.R. at 194.

Plan were the fact that, like the earlier plan filed by the Applicants, it violated § 1129(b)(2)(B)'s absolute priority rule, and it also granted a general discharge to non-debtors in violation of 11 U.S.C. § 524 and the Fifth Circuit's opinion in *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760 (5th Cir. 1995). Thus, the Court was compelled to deny approval of the Joint Disclosure Statement. Therefore, because the Applicants' work on the Joint Disclosure Statement and Joint Plan did not provide benefits to the Debtor that were "considerable in amount, value or worth," *DP Partners*, 106 F.3d at 673, the Court finds that the Applicants did not make a substantial contribution by participating in the drafting of the Joint Disclosure Statement and Joint Plan.

After proposing three subsequent amended plans, the Court finally confirmed the Plan Proponents' Third Joint Plan on February 10, 2003. Pursuant to the Third Joint Plan, two trusts were created: the Creditor's Trust, which received the available monies from the Bluestreak sale and the available avoidance and preference causes of action; and the Litigation Trust, which received all other causes of action owned by the estate. The claims held in the Litigation Trust will be brought by the Litigation Trustee, who will be selected by the Plan Proponents. Furthermore, the claims held in the Litigation Trust will be controlled by the Litigation Trust Board, which will be comprised by the Litigation Trustee, Browne, and two other unnamed former shareholders of the Debtor. Foremost, the Third Joint Plan offered select former shareholders, including the Applicants, the exclusive opportunity to invest in the Litigation Trust, with \$100,000 of the investment dedicated to the Creditor's Trust. In exchange for their investment in the two trusts, the former shareholders will receive a priority claim against the proceeds of any litigation to the full amount of their investment, plus an additional 75% ownership interest in any remaining net proceeds. The creditors will receive the remaining 25% interest in the remaining net proceeds.

As noted in the Trustee's "Limited Objection to the Motion," both the Trustee and the Applicants, as Plan Proponents, worked together to formulate a joint plan of reorganization by assigning each other tasks that otherwise would have been duplicated. Therefore, because the Applicants' participation in the drafting of the amended joint disclosure statements and amended joint plans of reorganization, acts which led to the confirmation of the Third Joint Plan, conferred significant and demonstrable benefits on the Debtor that "foster[ed] and enhance[ed]...the progress of reorganization," *Consolidated Bancshares*, 785 F.2d at 1253,

benefits that were “considerable in amount, value or worth,” *DP Partners*, 106 F.3d at 673, the Court finds that the Applicants did make a substantial contribution by participating in the drafting of the amended joint disclosure statements and amended joint plans of reorganization.

### **3. Actual and Necessary Expenses Under 11 U.S.C. § 503(b)(3)**

Even if a creditor makes a substantial contribution to a Debtor’s estate, the expenses must be actual and necessary under § 503(b)(3). Bankruptcy courts have “broad discretion” in determining whether expenses are actual and necessary, with the court required to “scrutinize claimed expenses for waste and duplication” and also “distinguish between expenses incurred in making a substantial contribution to the case and expenses lacking that causal connection, the latter being noncompensable.” *DP Partners*, 106 F.3d at 673-74.

Based on this Court findings that the Applicants did not make a substantial contribution in providing DIP Financing, participating in the sale of the Debtor’s assets, or proposing their own plan of reorganization, the \$327.04 in expenses listed in Exhibit A to the Motion are non-compensable. In addition, the \$1,172.03 in expenses listed in Exhibit B to the Motion, representing the expenses incurred from March 25, 2002 to April 24, 2002, are also non-compensable as expenses associated with fees listed in Exhibit A.<sup>9</sup> Additionally, based on this Court’s finding that the Applicants did not make a substantial contribution in opposing the Motion to Convert and proposing the Joint Disclosure Statement and Joint Plan, which were denied on August 22, 2002, the expenses associated with these actions are also non-compensable. Furthermore, because the descriptions accompanying the expenses prior to and on August 22, 2002 are inadequate, the Court finds that the Applicants have not established by a preponderance of the evidence that the expenses prior to and on August 22, 2002 were incurred in making a substantial contribution. *See Buttes Gas & Oil*, 112 B.R. at 193. Thus, the Court also finds that the expenses incurred prior to and on August 22, 2002, totaling \$2,518.05, are non-compensable. Therefore, of the \$4,782.19 in expenses requested by the Applicants, the Court disallows \$4,017.12 and allows \$765.07 as an administrative expense under 503(b)(3)(D).

### **4. Reasonable Compensation for Professional Services Under 11 U.S.C. § 503(b)(4)**

Finally, professional services rendered in making a substantial contribution are compensable if those services are reasonable under § 503(b)(4). Again, whether professional

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<sup>9</sup> The Court makes this determination based on the fact that the time sheets attached as Exhibit B begin with time entries on April 29, 2002.

services are reasonable is “committed to the sound discretion of the bankruptcy court[.]” but whether those services are reasonable “is expressly dependent upon a claimant[’s]...expenses, other than professional fees, be[ing] actual and necessary” under § 503(b)(3). *DP Partners*, 106 F.3d at 674. As the factors listed in § 503(b)(4) are subsumed in the *Johnson v. Georgia Highway Exp., Inc.* attorney’s fees analysis,<sup>10</sup> an award of professional services under § 503(b)(4) should also be governed by the *Johnson* factors. *DP Partners*, 106 F.3d at 674.

Again, based on this Court findings that the Applicants did not make a substantial contribution in providing DIP Financing, participating in the sale of the Debtor’s assets, or proposing their own plan of reorganization, the \$56,695.50 in fees listed in Exhibit A to the Motion are non-compensable. Additionally, based on this Court’s finding that the Applicants did not make a substantial contribution in opposing the Motion to Convert and proposing the Joint Disclosure Statement and Joint Plan, which were denied on August 22, 2002, the fees associated with these actions are also non-compensable. As it is the Applicants burden of proof to show by a preponderance of the evidence that the requested fees were incurred in making a substantial contribution, *see Buttes Gas & Oil*, 112 B.R. at 193, the Court finds that the Applicants have only met their burden as to the following fees incurred prior to and on August 22, 2002, which are fees associated with the revision and amendment of the Joint Disclosure Statement and Joint Plan:

7/30/02-\$117.50, 8/8/02-\$94.00 & \$70.50, 8/12/02-\$70.50, 8/19/02-\$109.50 & \$117.50, 8/20/02-\$109.50, 8/21/02-\$365.00, \$292.00, \$141.00 & \$94.00, 8/22/02-\$1,003.75, totaling \$2,584.75, but reduced by one-fourth to \$1,938.56.<sup>11</sup>

Thus, the Court finds that of the fees incurred prior to and on August 22, 2002, only \$1,938.56 is compensable. The Court further finds that the fees from August 23, 2002 to September 18, 2002, totaling \$18,521.25, are compensable. Therefore, of the \$59,146.50 in fees listed in Exhibit B,

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<sup>10</sup> 488 F.2d 714 (5th Cir. 1974).

<sup>11</sup> The Court notes that the Plan Proponents filed their First Amended Joint Disclosure Statement (the “First Joint Disclosure Statement”) and First Amended Joint Plan of Reorganization (the “First Joint Plan”) on August 22, 2002, the same day the Court conducted the hearing on the Joint Disclosure Statement and Joint Plan. Thus, the First Joint Disclosure Statement and First Joint Plan did not incorporate the changes that this Court required be included in the joint disclosure statement and plan at the August 22, 2002 hearing. Accordingly, the value of the work undertaken by the Applicants on the First Joint Disclosure Statement and First Joint Plan must be diminished. *DP Partners*, 106 F.3d at 673 (“the cost of the claimed fees and expenses [must be weighed] against the benefits conferred upon the estate which flow *directly* from those actions”).

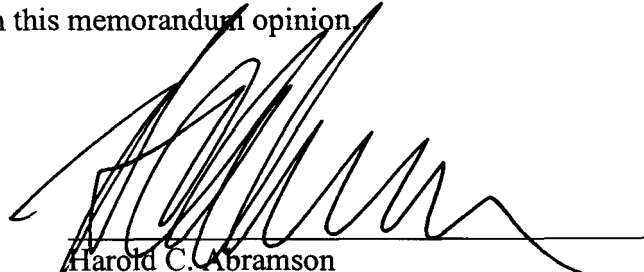
the Court finds that only \$20,459.81 is compensable as an administrative expense under 503(b)(3)(D).

#### CONCLUSION

The Court finds that the Applicants have made a substantial contribution in participating in the drafting of the amended joint disclosure statements and amended joint plans of reorganization. Thus, the Court finds that the \$21,224.88 incurred by the Applicants in making a substantial contribution under § 503(b)(3)(D), comprised of \$20,459.81 in fees and \$765.07 in expenses, is compensable as an administrative claim. Therefore, the estate will disburse \$21,224.88 as an administrative expense, with all other requested fees and expenses in the Applicants' Motion for Allowance of Fees and Expenses as an Administrative Claim denied.<sup>12</sup>

A separate order will be entered consistent with this memorandum opinion.

Signed this **SEP 05 2003**  
\_\_\_\_\_ day of September, 2003.



Harold C. Abramson  
United States Bankruptcy Judge  
Northern District of Texas

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<sup>12</sup> The \$21,224.88 granted herein as a § 503(b)(3)(D) administrative claim is in addition to the \$50,000.00 set aside under Section 6.3 of the Third Joint Plan. Section 6.3 of the Third Joint Plan will govern any subsequent disbursements for the Applicants.